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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re

BRADLEY GOODRICH

on Habeas Corpus.

B242254

(Los Angeles County  
Super. Ct. No. YA063387)

ORIGINAL PROCEEDINGS in Habeas Corpus. Steven Van Sicklen, Judge.

Order to Show Cause Returnable to the Superior Court Shall Issue.

California Appellate Project, Jonathan B. Steiner and Richard B. Lennon for  
Petitioner.

Bradley Goodrich, in pro. per., for Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne and  
E. Carlos Dominguez, Deputy Attorneys General.

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Petitioner Bradley Goodrich filed the instant petition for writ of habeas corpus, asserting that his attorney rendered ineffective assistance of counsel in advising him to accept a plea bargain. Based on the record before this court, and certain concessions made by the Attorney General, we conclude that proper disposition of this petition requires a further trial court hearing as to all of the factual circumstances on which Goodrich's claim of ineffective assistance of counsel is based. We therefore will issue an order to show cause returnable to the trial court on this issue.

### ***FACTUAL AND PROCEDURAL BACKGROUND***

On October 11, 2006, petitioner was charged by amended information with: (1) attempted premeditated murder (Pen. Code, §§ 664, 187); (2) infliction of corporal injury to a spouse (Pen. Code, § 273.5); and (3) kidnapping (Pen. Code, § 207).<sup>1</sup> It was further alleged, in connection with the first two counts, that petitioner inflicted great bodily injury on his spouse under circumstances involving domestic violence (Pen. Code, § 12022.7(e)); and, in connection with all three counts, that petitioner suffered a prior conviction within the meaning of Penal Code section 1170.12 (the "three strikes" law) and Penal Code section 667, subdivision (a)(1) ("prior serious felony"). The prior conviction was suffered in Los Angeles Superior Court Case No. SA040761, in which Goodrich pleaded no contest to aggravated assault under Penal Code section 245, subdivision (a)(1).

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<sup>1</sup> According to Goodrich, the offenses arose from an incident in which he choked his wife, a "crime of passion aggravated by his wife's adulterous relationship."

Count one, for attempted premeditated murder, subjected petitioner to an indeterminate life sentence, with the possibility of parole. (Pen. Code, § 664, subd. (a).) According to petitioner, the prosecution offered a plea deal, which provided that if he pleaded guilty to the offense of attempted (non-premeditated) murder, and admitted the sentence enhancements, he would receive a sentence of 20 years in prison, calculated as follows: five years (low term) for attempted murder, doubled for the strike, plus five years (high term) for infliction of great bodily injury on a spouse, plus five years for the prior serious felony. Petitioner alleges that he informed his trial counsel that his prior conviction did not constitute a strike or a prior serious felony, and that he did not want to accept a deal under which his sentence would be enhanced for the prior conviction. According to petitioner, he made the trial court aware of his concerns regarding his prior conviction. The trial court “agreed that the plea offer should stand pending the [prosecution] and [d]efense [c]ounsel’s investigation” of the prior conviction, and report to the court. The next day, the trial court informed petitioner that the court had investigated the prior conviction and “deemed it a valid enhancing offense.” Petitioner then accepted the plea offer, relying on the court’s characterization of the prior conviction. He was sentenced to 20 years in prison, pursuant to the plea agreement. The remaining charges were dismissed.

Petitioner takes the position that the prior conviction was not a prior strike or prior serious felony, and that his counsel had provided ineffective assistance by failing to argue to the contrary before the trial court. He also argues that he would have been in

a more favorable negotiating position had his prior conviction not been considered as an enhancing offense.

Petitioner filed a series of habeas petitions, both in the trial court and in this court. He raised numerous challenges, including challenges relating to his prior conviction. His most recent petition in the trial court was denied on May 31, 2012. The trial court's denial of the petition reads, in part, as follows: "This Writ is based on a claim of ineffective assistance of counsel in not investigating an alleged strike prior to which defendant admitted as part of a plea bargain in this case. He now claims it was not a strike because it was expunged. Petitioner has made these claims before. *The prior was a strike*. He plead to a violation of [Penal Code section] 245(a)(1) *and admitted to a Great Bodily Injury allegation pursuant to [Penal Code section] 12022.7(e).*" (Italics added.)

Petitioner then filed the instant habeas petition in this court. Attached as an exhibit is the minute order reflecting his plea to the aggravated assault in Case No. SA040761. It demonstrates that petitioner pleaded no contest to a violation of Penal Code section 245, subdivision (a)(1). There is, however, no indication that petitioner admitted a great bodily injury allegation.<sup>2</sup>

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<sup>2</sup> The trial court ruling on the habeas petition may have been confused. Petitioner admitted a great bodily injury allegation in connection with the *instant* attempted murder offense. It does not appear, based on the record before us, that he did so in connection with the *prior* conviction.

An aggravated assault, under Penal Code section 245, subdivision (a)(1), may or may not constitute a serious felony.<sup>3</sup> In 2000, at the time of petitioner's prior conviction, Penal Code section 245, subdivision (a)(1) prohibited assault "with a deadly weapon or instrument other than a firearm or by means of force likely to produce great bodily injury." If a deadly weapon was used in an aggravated assault (Pen. Code, § 1192.7, subd. (c)(31)) or a defendant personally inflicted great bodily injury (Pen. Code, § 1192.7, subd. (c)(8)), then the assault constitutes a serious felony. However, if no deadly weapon was used, and the defendant simply used force *likely* to cause great bodily injury, but did not *actually* do so, Penal Code section 245 is violated but the felony is not a serious felony.<sup>4</sup> (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261.)

The trial court's ruling on petitioner's habeas petition was therefore troubling. The court indicated that petitioner's prior assault conviction constituted a strike because

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<sup>3</sup> Both serious and violent felonies constitute strikes. (Pen. Code, § 1170.12, subd. (b)(1).) In this case, there is no suggestion that petitioner's prior conviction is for a violent felony. The issue is solely whether it constitutes a serious felony; if so, it constitutes a serious felony for both the prior serious felony enhancement and the three strikes law.

<sup>4</sup> Prior to March 8, 2000, Penal Code section 1192.7 did not identify assault with a deadly weapon as a serious felony. (*People v. James* (2001) 91 Cal.App.4th 1147, 1149, 1151.) However, any felony in which the defendant *personally used* a dangerous or deadly weapon was a serious felony. (Pen. Code, § 1192.7, subd. (c)(23).) As such, prior to March 8, 2000, if a defendant aided and abetted an assault with a deadly weapon, but did not *personally use* a deadly weapon, the crime did not constitute a serious felony. (*People v. Rodriguez, supra*, 17 Cal.4th at p. 261.) In this case, both petitioner's prior offense and his instant offense occurred after March 8, 2000, so no argument can be made that the prior law applied. Now that assault with a deadly weapon is specifically identified as a serious felony (Pen. Code, § 1192.7, subd. (c)(31)), personal use of the deadly weapon is not necessary to render the crime a serious felony.

he had admitted inflicting great bodily injury. But the record indicates that petitioner had *not* admitted inflicting great bodily injury, which left open the possibility that he had admitted a violation of Penal Code section 245, subdivision (a)(1), which was not a serious felony.

Concerned by this discrepancy, on July 5, 2012, we requested the Attorney General file preliminary opposition to the petition, addressing the issue. There followed a series of extension requests as the Attorney General's office had some difficulty obtaining the superior court file from Case No. SA040761, and the reporter's transcript of petitioner's plea in that case. Eventually, the transcript was obtained. It reflects that petitioner had entered a plea of no contest to "a violation of 245(a)(1) of the Penal Code, assault with a deadly weapon, a glass bottle,<sup>5</sup> or by means of force likely to produce great bodily injury." *He did not admit inflicting great bodily injury.*

Apparently in light of this transcript, the Attorney General's preliminary opposition contained the following concession: "Petitioner did not admit to a personal infliction of great bodily injury when he pleaded no contest to a violation of Penal Code section 245, subdivision (a)(1), and thus it does not constitute a serious or violent felony within the meaning of the Three Strikes Law." The Attorney General then argued, however, that we should nonetheless summarily deny petitioner's petition on grounds of procedural default.

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<sup>5</sup> In the instant proceeding, petitioner suggests that it was not a glass bottle, but a champagne flute, with which he struck the victim on the head, breaking the glass. He makes no mention of any injuries the victim may have suffered.

We issued an order to show cause, and ordered counsel appointed for petitioner. We indicated that, if the Attorney General elected to deem its preliminary opposition to be the return to the petition, it should notify the court. The Attorney General elected to do so, thereby raising no substantive opposition to the petition. Petitioner's counsel filed a traverse, refuting the Attorney General's allegations of procedural default.<sup>6</sup> Both parties then waived oral argument.

As a result of these circumstances, this court was faced with the situation in which both parties had *agreed* that petitioner's sentence was enhanced by ten years based on a prior conviction *which was not a serious felony* and therefore did not justify the prior serious felony and second strike enhancements. Neither party, however, had briefed the manner in which this court should proceed. We therefore requested the parties to address the issue of remedy in letter briefs, and to attend oral argument.

### ***ISSUES RAISED***

As we shall discuss, although the prosecution has conceded that petitioner's prior aggravated assault conviction was not a serious felony, the concession may have been

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<sup>6</sup> The Attorney General argues that petitioner waited five years to raise this claim and it is therefore untimely. The Attorney General also argues that petitioner filed numerous habeas petitions in which the issue could have been raised. The Attorney General did not supply this court with any evidence on which we could conclude that the issue *was not* raised in the earlier petitions, simply stating, "[u]nless required by this Court, previously filed habeas petitions will not be lodged in conjunction with this preliminary opposition." Petitioner's counsel filed a traverse demonstrating that, in at least one prior habeas petition, filed within one year of his instant conviction, petitioner did, in fact, challenge his counsel's failure to argue that the prior conviction was not a strike. In any event, petitioner raises issues of an illegal sentence, which the prosecution appears to concede. Under the circumstances, we will not disregard the contentions on the basis of an alleged procedural default.

premature. It may well be that petitioner's prior conviction was, in fact, the conviction of a serious felony, in which case there was no ineffective assistance of counsel, and no remedial action is necessary. Moreover, even if the prior conviction was not a serious felony conviction, factual issues still exist regarding ineffective assistance of counsel. The prosecution's concession, however, combined with petitioner's assertions, establishes a prima facie case of ineffective assistance of counsel. As such, a further factual trial court inquiry into the issue of whether petitioner's counsel rendered ineffective assistance with respect to his plea must be conducted.

### ***DISCUSSION***

#### ***1. It Is Unknown Whether Petitioner's Prior Assault Conviction Constituted a Prior Serious Felony Conviction***

As discussed above, a conviction of aggravated assault may or may not constitute a serious felony. (*People v. Rodriguez, supra*, 17 Cal.4th at p. 261.) Standing alone, a plea of no contest to the offense does not establish a serious felony conviction. (*Ibid.*) In order to establish that the felony was serious, the prosecution would be required to establish the use of a deadly weapon or the personal infliction of great bodily injury.

This may be established, however, by use of the "entire record" of the prior conviction. (*People v. Rodriguez, supra*, 17 Cal.4th at p. 261.) Had this case proceeded to trial, and a trial been held on whether petitioner's prior conviction constituted a serious felony, the prosecution could have relied, for example, on the preliminary hearing transcript in Case No. SA040761 to demonstrate either the use of a deadly



weapon or the personal infliction of great bodily injury.<sup>7</sup> (*People v. Morgan* (2011) 194 Cal.App.4th 79, 85-86.) If a review of the preliminary hearing transcript provides evidence that petitioner used a deadly weapon<sup>8</sup> or personally inflicted great bodily injury, it would have been provable that his prior conviction was a serious felony, and counsel would not have rendered ineffective assistance by recommending that petitioner accept the plea which included admitting the enhancements.

2. *It Is Unknown Whether Goodrich's Counsel Rendered Ineffective Assistance*

Petitioner assumes that if his prior conviction does not constitute a serious felony, his counsel rendered ineffective assistance by recommending that he accept a plea agreement under which his sentence was enhanced for a prior serious felony conviction and a prior strike. The conclusion does not necessarily follow. While it is true that a trial court should not accept an admission of a prior serious felony conviction which was not, in fact, a serious felony (*People v. Ellis* (1987) 195 Cal.App.3d 334, 343), a defendant may be estopped to challenge the sentence enhancement imposed

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<sup>7</sup> Indeed, petitioner's exhibits demonstrate that his counsel in the underlying action reviewed the preliminary hearing transcript from Case No. SA040761, to learn "about the underlying facts of [the] prior strike."

<sup>8</sup> While petitioner asserts that, in the prior assault, he struck the victim with a champagne flute, the information in that case apparently alleged he struck the victim with a glass bottle. While a glass bottle is not a deadly weapon as a matter of law, it may be one depending on the circumstances in which it is used. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029; cf. *People v. Zermeno* (1999) 21 Cal.4th 927, 931.) In its supplemental letter brief, the Attorney General suggests that, as petitioner pleaded to assault with a deadly weapon, the prior conviction was, in fact, a strike. But petitioner pleaded to "assault with a deadly weapon . . . or by means of force likely to produce great bodily injury." The use of the disjunctive renders the admission ambiguous.

when the defendant has admitted the prior serious felony conviction as part of a plea bargain (*id.* at pp. 344-346). That is to say, “[w]hen a defendant maintains that the trial court’s sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.” (*People v. Couch* (1996) 48 Cal.App.4th 1053, 1057.) Thus, if it can be shown that defense counsel recommended that petitioner accept the plea bargain, *even knowing that the prior conviction did not constitute a prior serious felony conviction*, in order for petitioner to avoid a potential indeterminate life sentence, and petitioner accepted this advice under those circumstances, this may support a finding that petitioner’s counsel did *not* render ineffective assistance.

### 3. *A Further Hearing Is Necessary*

The record and briefs before this court, however, are sufficient to require a hearing. “ ‘To establish ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel’s representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the petitioner. [Citations.]’ [Citation.]” (*People v. Landau* (2013) 214 Cal.App.4th 1, 13, petn. for review filed Mar. 21, 2013.) Petitioner represents that he did not wish to accept a plea bargain which included a sentence enhancement for the prior conviction if it was not a serious felony. Indeed, he represents to this court that he made the trial

court aware of these concerns, and the trial court, before accepting his plea, requested counsel to look into the circumstances of the prior conviction. Petitioner argues that he would have been in a better negotiating position had the trial court been aware that his prior conviction was not, in fact, a prior serious felony conviction. Furthermore, the Attorney General has conceded that petitioner's prior conviction was not, in fact, a prior serious felony conviction. Taken together, these facts are sufficient to raise a prima facie case of ineffective assistance of counsel. A hearing must therefore be held.

Should it be concluded that petitioner's counsel did not render ineffective assistance, then petitioner was properly sentenced and no further proceedings are required. Should it be concluded, however, that petitioner's counsel did render ineffective assistance, then petitioner should be given the opportunity to vacate the plea agreement. Should he do so, the prosecution would be permitted to reinstate the charges which were dismissed as part of the plea agreement. "A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) "Critical to plea bargaining is the concept of reciprocal benefits. When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made." (*People v. Collins* (1978) 21 Cal.3d 208, 214.) As such, when a defendant withdraws a plea or otherwise attacks it, dismissed counts may be restored. (*Id.* at p. 215.) There would be no limitation on the sentence which could be imposed on retrial or resentencing. When a defendant successfully challenges a sentence as in excess of the court's jurisdiction, the defendant cannot then claim protection of that

sentence as a limitation on what the trial court may do thereafter. (*People v. Craig* (1998) 66 Cal.App.4th 1444, 1449.)

***DISPOSITION***

We hereby issue an order to show cause, returnable to the Superior Court of Los Angeles County, directing the Superior Court to hold an evidentiary hearing on the issue of whether petitioner's counsel rendered ineffective assistance in connection with his plea bargain. Counsel should be appointed for petitioner in connection with these proceedings. Should the trial court determine that petitioner's trial counsel did not render ineffective assistance of counsel in the proceedings below, then the trial court should deny his habeas corpus petition and discharge the order to show cause as no further action on this matter would be required. Should the trial court, however, conclude that ineffective assistance of counsel was rendered, then the trial court should grant petitioner's petition and conduct such further proceedings as may be appropriate and are not inconsistent with the views expressed herein.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.